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No. 98-1692

In the Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA AND BILLY CYPRESS, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by disposing of petitioners' claims against the federal respondents without permitting discovery.

2. Whether the court of appeals' citation to an intervening decision of this Court required remand of the case to the district court to permit petitioners to amend their complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 163 F.3d 1359 (Table). The opinion of the district court (Pet. App. 7a-46a) is reported at 980 F. Supp. 448.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1998. A petition for rehearing was denied on January 27, 1999 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on April 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from flooding caused by unusually heavy rains throughout central and south Florida during August, September, and October of 1994, followed almost immediately by Tropical Storm Gordon. The heavy rainfall subjected much of central and south Florida, and particularly the Everglades region, to flooding at a magnitude seen only once in every 50 years. Petitioners, the Miccosukee Tribe of Indians and Billy Cypress, reside within the Everglades region, within or near the northern boundaries of Everglades National Park. Petitioners filed this action against the South Florida Water Management District (SFWMD), the United States, the National Park Service, and the United States Army Corps of Engineers (Corps), asserting that the denial of two of their requested flood relief measures violated the Due Process Clause and the Equal Protection Clause. The district court granted summary judgment to respondents, and the Eleventh Circuit affirmed in an unpublished opinion.

1. Various statutes govern flood control, water supply, and environmental preservation in south Florida's regional hydrologic system and Everglades National Park. Since the 1940s Congress has enacted various flood-control legislation based on its recognition that "the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes." 33 U.S.C. 701a. Responsibility for implementing flood control projects is assigned to the United States Army Corps of Engineers. 33 U.S.C. 701b.

In 1948, Congress authorized the Central and Southern Florida Project (C&SF Project) as a comprehensive

flood control plan for the region. See Act of June 30, 1948, ch. 771, 62 Stat. 1171, 1175-1176 (codified at 33 U.S.C. 701-709b (1994 & Supp. III 1997)). The C&SF Project was intended to "control high water conditions * * * during the rainy season, and to impound additional water in Lake Okeechobee for use during the dry season." *Florida E. Coast Ry.* v. *United States*, 519 F.2d 1184, 1187 (5th Cir. 1975). See H.R. Doc. No. 643, 80th Cong., 2d Sess. (1948). The project furthers restoration and preservation goals in the unique Everglades Region and was developed "in full recognition of the importance of the Everglades National Park * * * at the southwestern tip of the Florida peninsula." H.R. Doc. No. 643, *supra*, at 4.[1]

The C&SF Project spans the area of south Florida from Lake Okeechobee to Florida's southernmost tip. That area contains three interconnected reservoirs—termed water conservation areas, or WCAs—of approximately 1350 square miles. The reservoirs impound water, while certain water control structures

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[1] The 1948 authorization governed the first phase of the Project, and the Project has been modified in a number of subsequent Acts of Congress. The Flood Control Act of 1954, ch. 1264, 68 Stat. 1248, adopted the entire plan. The Flood Control Act of 1968, Pub. L. No. 90-483, Tit. II, § 203, 82 Stat. 740-741, authorized the Everglades National Park-South Dade Conveyance System in accordance with H.R. Doc. No. 369, 90th Cong., 2d Sess. (1968). That document provided that "preservation of Everglades National Park is a project purpose and that available water should be provided on an equitable basis with other users." *Id.* at 1. In 1970, Congress approved a minimum delivery schedule of waters to Everglades National Park. River Basin Monetary Authorization and Miscellaneous Civil Works Amendments Act of 1970, Pub. L. No. 91-282, § 2, 84 Stat. 310. That schedule was later modified by the Supplemental Appropriations Act, 1984, Pub. L. No. 98-181, 97 Stat. 1153.

such as levees and gates regulate the inflow and outflow of water in WCAs. The impounding of waters in and outflow of waters from WCAs serve to store rainfall and run-off to prevent flooding, provide water for agricultural lands, preserve fish and wildlife, promote recreation and navigation, and preserve an adequate supply of fresh water to the Everglades. Pet. App. 14a-15a.

The 1948 Act grants the Corps of Engineers broad discretion in developing water-control plans and managing the operations and water levels of Water Conservation Areas. Recognizing that management of flood control projects requires the balancing of competing interests, Congress declined to waive the government's sovereign immunity from suits to recover damages for injury caused by flood or flood waters. See 33 U.S.C. 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). Thus, Congress barred all suits, whether for damages or equitable relief, except those seeking limited review under the Administrative Procedure Act. See *United States* v. *James*, 478 U.S. 597, 604-605 (1986); *Reese* v. *South Fla. Water Management Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995). In the exercise of its discretion, the Corps has generated water control plans and manuals establishing operating instructions to permit the proper balance of storage water to accumulate during the wet season for use in the dry season.[2] See Pet. App. 15a-16a.

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[2] In developing water control plans, the Corps is subject to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pursuant to NEPA, the Corps prepared the June 1993 Final Environmental Assessment (EA) for the

2. In 1916, Congress created the National Park Service, an agency within the Department of the Interior, to administer the national park system.[3] The National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, defines the scope of the authority it confers as follows:

> The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

National Park Service Organic Act, ch. 408, § 1, 39 Stat. 535, as amended, 16 U.S.C. 1a-1. The Act provides that the "fundamental purpose of the said parks, monuments, and reservations * * * is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same * * * unimpaired for the enjoyment of future generations." 16 U.S.C. 1 (Supp. III 1997).

Recognizing that the Everglades comprise "a country distinctly different from anything else in all our great country, if not in the entire world," 78 Cong. Rec. 9501 (1934) (statement of Rep. Treadway), Congress in 1934

Experimental Program of Water Deliveries to Everglades National Park, which sets forth detailed operating criteria for the C&SF Project. See *South Dade Land Corp.* v. *Sullivan*, 853 F. Supp. 404, 409-410, 412 (S.D. Fla. 1993) (approving June 1993 EA). The operating criteria provide mandatory schedules and conditions for some structures within the Project.

[3] See *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 187 n.1 (1968).

"authorized establishment of the Everglades National Park." *Organized Fishermen* v. *Hodel*, 775 F.2d 1544, 1546 (11th Cir. 1985) (citing 16 U.S.C. 410), cert. denied, 476 U.S. 1169 (1986). The Everglades National Park Acts, 16 U.S.C. 410 *et seq.*, provide that the "administration, protection, and development" of the Park shall "be exercised under the direction" of the Secretary of the Interior, through the National Park Service. 16 U.S.C. 410b. The Park Service must administer the Park as a wilderness and "preserv[e] intact * * * the unique flora and fauna and the essential primitive natural conditions now prevailing in this area." 16 U.S.C. 410c.

Under 16 U.S.C. 410b, "nothing in sections 410 to 410c * * * shall be construed to lessen any existing rights of the Seminole Indians which are not in conflict with the purposes for which the * * * Park is created." See 16 U.S.C. 1, 1a-1 (1994 & Supp. III 1997). The Everglades National Park Acts, in 16 U.S.C. 410b, also require the Park Service to administer the Park "subject to the provisions of section[] 1" of the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, described above.

3. In late August to October 1994, central and south Florida received record levels of rainfall. Pet. App. 16a-17a. In November 1994, Tropical Storm Gordon brought extremely heavy rains to the already-saturated region, resulting in flood conditions in much of central and south Florida. *Id.* at 20a-21a.

Among the areas affected by the heavy rainfall were areas where petitioner Miccosukee Tribe has interests. The United States holds in trust for the Tribe certain reservation lands in the Everglades area north of

Everglades National Park.[4] Also, east of and adjacent to the main reservation lies a 189,000-acre tract of land the Tribe has leased from the State of Florida (the Leased Area). In 1994, the Tribe additionally had the right to use and occupancy of a 333-acre tract of land located within the Everglades National Park pursuant to a special use permit issued by the Park Service (the Permit Area). The special use permit, negotiated in 1964, subjects the area to federal statutes granting discretion to the Park Service to operate the Everglades National Park. Both the Leased Area and much of the Miccosukee Reservation (50,000 acres) are located within a WCA (WCA-3A), which, as described above, is a flood control area where water is impounded. Pet. App. 11a-13a.

The heavy rains and Tropical Storm Gordon affected the Tribe, its lands, and its ability to plant crops and engage in traditional religious ceremonies on its lands. Pet. App. 20a-21a. The heavy rains also caused unusually high water levels within Everglades National Park, which lies immediately south of the Miccosukee Permit Area. *Id.* at 17a, 21a. As part of their flood control responsibilities, the Corps and the SFWMD, the state entity charged with flood control duties, released water from WCA-3A, which exacerbated flooding in the Park. *Id.* at 17a-18a. The water released from WCA-3A flowed downstream into the Park through a series of flood control devices known as the "S-12 structures." *Ibid.*

The flooding had a direct and adverse impact on natural resources in the Park. The high water levels and attendant circumstances killed white-tailed deer

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[4] No members of the Tribe live on the reservation lands. Pet. App. 11a.

and other wildlife in the Park and disturbed reproductive cycles and predator-prey dynamics of endangered and other wildlife species such as the Florida Panther, Cape Sable Seaside Sparrow, and the American Alligator. Pet. App. 21a-22a; R. 45, attachs. 5-7.

The heavy rains and flood water releases also had a severe impact on the physical infrastructure and operations at the Park. Six to twenty inches of water covered the entrance, parking lot, and other parts of the Shark Valley visitor area (located just to the east of the Tribe's Permit Area). Pet. App. 17a. In fact, before Tropical Storm Gordon, the heavy rainfall required the Park Service to close the Shark Valley visitor area for several days, and after the Tropical Storm, Shark Valley was closed until February 1995. *Id.* at 17a, 21a.

4. During the flooding, representatives of the Park Service, the Corps of Engineers, and SFWMD conferred with the Tribe regarding how best to address flood-related problems affecting the Tribe. The agencies implemented or approved numerous measures intended to provide flood relief for the Tribe, particularly within the Permit Area, which houses the Tribe's offices and residences for most of its members. Pet. App. 19a-20a, 22a-25a. Two of the Tribe's numerous flood control requests, however, were not approved.

First, the Tribe requested that flood control structure S-333 (located in the southeast corner of WCA-3A) be opened to discharge water from WCA-3A to the east. The Corps and SFWMD refused to open the structure due to strict regulations permitting the structure to be opened only if certain prescribed water levels existed in canals and monitoring wells. Pet. App. 18a, 23a.

Second, the Tribe requested the removal of certain vegetation located south of the S-12 structures within

the Everglades National Park. The Tribe believed that removing the vegetation would accelerate the flow of water through the structures out of WCA-3A. After much consideration and discussion with the Tribe, however, the Park Service eventually refused to approve the cutting of the vegetation for several reasons.[5] Park Service officials were concerned that removing the vegetation would adversely affect water quality and destroy natural vegetation in the Park by releasing undesirable nutrients into the water column, which flows south into the Park. Pet. App. 19a, 25a. In addition, Park Service officials feared that even if removing the vegetation would increase flows through the S-12 structures, that increase would necessarily increase the total flow into the Park and aggravate existing damage to the Park's natural resources and infrastructure. *Id.* at 25a. And because prior experimentation with vegetation removal elsewhere in the Park had resulted in no noticeable flow increases over time but had greatly increased the volume of sediment, pollutants, and plant debris flowing into the Park, the Park Service concluded that the speculative benefit of the proposal would not be worth the resultant damage to the Park stemming from its implementation. *Ibid.*[6]

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[5] The Corps, without weighing issues of water quality, wildlife impacts, or the health of the Everglades ecosystem, had indicated that it believed removal of the vegetation should technically increase water flow through the structures. Pet. App. 18a-19a, 23a. As discussed below, however, the Park Service, after considering the impact of the proposed action on water quality, wildlife, and the ecology of the area, and balancing the needs of the Everglades National Park, concluded that the Tribe's proposal would be inappropriate and, perhaps, ineffective.

[6] The agencies' efforts to reduce flooding in the Miccosukee's Permit Area, however, were largely successful. In November and

5. On March 16, 1995, petitioners filed suit against officials of the Park Service, the Corps of Engineers, and the SFWMD seeking declaratory and injunctive relief to compel the agencies to relieve flooding conditions on its lands.[7] Petitioners alleged violations of the Due Process Clauses of the Fifth and Fourteenth Amendments and of the Equal Protection Clause, as well as violations of trust duties owed by the federal defendants. With their complaint, petitioners filed an emergency motion for a preliminary injunction seeking removal of the vegetation behind the S-12 structures. Pet. App. 61a-74a.

After a hearing, the district court denied the motion for a preliminary injunction. Pet. App. 8a. Petitioners did not appeal that ruling, nor did they move to establish a discovery schedule or file any document requests or interrogatories.

Nearly two months after the denial of the preliminary injunction, the federal respondents and the SFWMD moved for summary judgment. On June 16, 1995, petitioners moved, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, to foreclose entry of summary judgment based upon an allegedly inadequate

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December 1994, Park personnel observed no more than six to eight inches of water on driveway aprons at the west end of the Permit Area and even lower water levels over portions of interior roads in the area. Although some of the Tribe's businesses had shallow standing water, residences were three to four feet above high-water levels. R. 45, attach. 4, ¶ 6.

[7] Petitioners originally asserted a *Bivens* claim seeking damages against Everglades National Park Superintendent Richard G. Ring and Special Assistant to the Assistant Secretary of the Interior for Fish and Wildlife, Barbara J. West, in their individual capacities. Petitioners subsequently agreed to a voluntary dismissal of that claim. Pet. App. 8a.

opportunity to conduct discovery. R. 65.[8] With that motion, petitioners included one affidavit, document production requests, and interrogatories. Petitioners filed six additional affidavits with their opposition to respondents' summary judgment motions and their own cross-motion for summary judgment. In response, the respondents opposed the Rule 56(f) motion and moved for protective orders staying discovery. R. 81, 85.

In an order entered on August 21, the district court denied petitioners' Rule 56(f) motion to foreclose entry of summary judgment. Order on Motion Under Rule 56(f) and Motions for Protective Orders (Rule 56(f) Order). The district court recognized that Rule 56(f) allows a party to survive a summary judgment motion if it "presents valid reasons justifying his failure of proof." *Id.* at 3 (quoting *Barfield* v. *Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quotation marks omitted)). Following well-settled Eleventh Circuit precedent, however, the court held that petitioners had failed to carry their burden to present an affidavit that contains specific facts and explains how deferring disposition by summary judgment would allow them, through discovery or other means, to rebut the respondents' showing that no material facts were in dispute. *Ibid.* After examining the matters petitioners alleged they could produce through discovery, the court explained that "a careful review of the list reveals that many of

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[8] Although Federal Rule of Civil Procedure 56(b) permits a defending party to move "at any time" for summary judgment, Rule 56(f) provides that "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had."

the entries relate to legal issues or factual matters that are not in dispute." *Id.* at 4.

Addressing petitioners' claim that discovery could show purposeful discrimination, the court found that the requested discovery might "make the Tribe aware of more meetings and documents" but that the Tribe had not shown how that information would enable it to show discrimination. Rule 56(f) Order, *supra*, at 5. Noting that an affidavit submitted by the Tribe merely alleged that respondents had meetings to which the Tribe was not invited, and that documents relating to those meetings would show purposeful discrimination, the court held that that "vague assertion" was "no more than speculation regarding the existence of probative evidence" and was insufficient to meet the burden of showing specific facts. *Id.* at 5-6. The court therefore denied petitioners' Rule 56(f) motion, finding that the extensive record generated during the preliminary injunction stage was "more than sufficient" to resolve the issues raised on summary judgment. The court also stayed discovery until it ruled on the summary judgment motions.

In July 1997, after the district court scheduled a hearing on the summary judgment motions and almost two years after the court denied petitioners' Rule 56(f) motion, petitioners moved to lift the stay of discovery and filed one supplemental affidavit on the issue of the SFWMD's Eleventh Amendment immunity. On August 1, 1997, the district court granted summary judgment in favor of the federal defendants and the SFWMD.[9] Pet. App. 7a- 46a.

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[9] At the hearing on the summary judgment motions, petitioners renewed their Rule 56(f) motion. With respect to that renewal, the district court ruled (Pet. App. 9a n.1) that petitioners "did not state

6. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court of appeals held that the federal respondents had not violated their general duty of trust to the Tribe and that none of the applicable statutes, regulations, or agreements gave rise to any specific duties requiring the flood control measures requested by the Tribe. *Id.* at 2a-3a (comparing *United States* v. *Mitchell*, 463 U.S. 206, 224-228 (1983), with *Vigil* v. *Andrus*, 667 F.2d 931, 934 (10th Cir. 1982)). The court of appeals further held that petitioners failed to raise a genuine issue of material fact as to its due process and equal protection claims against the federal respondents. Pet. App. 3a. Noting that to prove their various constitutional claims petitioners were required to present proof of discriminatory intent, that there is a special relationship giving rise to a governmental duty of care, and that governmental action that impinged upon the Tribe's exercise of religion was not neutral or generally applicable, the court held that in their affidavits petitioners did "not allege[] any specific, nonconclusory facts that would enable [them] to prove these claims." *Id.* at 4a.

Finally, the court of appeals rejected petitioners' challenge to the district court's denial of their Rule 56(f) motion to defer consideration of the motions for summary judgment. Pet. App. 6a. The court held that petitioners "ha[ve] not demonstrated how further discovery would 'enable [them] * * * to rebut [respondents'] showing of the absence of a genuine issue of fact.'" *Ibid.* (quoting *SEC* v. *Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980), cert.

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what specific facts [they] expected further discovery to produce" and held that petitioners failed to meet their burden to show that any genuine issues of material fact remained.

denied, 449 U.S. 1082 (1981)). Based on that failure, the court held that the district court did not abuse its discretion in denying petitioners' Rule 56(f) motion and staying discovery pending disposition of respondents' summary judgment motions. *Ibid.*[10]

ARGUMENT

Petitioners contend (Pet. 11-20) that the court of appeals erred in affirming the district court's denial of their Rule 56(f) motion to foreclose summary judgment and its grant of summary judgment in favor of the federal respondents without permitting discovery. Petitioners also contend (Pet. 20-22) that the Eleventh Circuit erred by failing to remand the case to permit petitioners to amend their complaint. Contrary to petitioners' contentions, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue (Pet. 11) that the court of appeals' decision conflicts with this Court's decision in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986), which petitioners erroneously characterize as holding (Pet. 11, 17) that parties are invariably entitled to discovery before entry of summary judgment. *Celotex* does not so hold. Rather, *Celotex* sets forth the criteria for summary judgment, instructing that it may be granted where the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; to meet that burden, the moving party need not

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[10] The court of appeals also held that petitioners failed to raise a genuine issue of material fact with respect to their claims against the SFWMD. Pet. App. 4a-5a.

support its motion with affidavits or other materials negating its opponent's claims. 477 U.S. at 322-323. This Court also noted that problems relating to premature motions for summary judgment may be adequately dealt with under Rule 56(f) of the Federal Rules of Civil Procedure. 477 U.S. at 326 n.6. Here, the court of appeals held that the district court acted within its discretion in denying petitioners' Rule 56(f) motion because the affidavit supporting that motion wholly failed to explain what material facts further discovery would enable them to prove and why further discovery was necessary. That disposition in no way conflicts with *Celotex*.[11]

Moreover, the courts below followed well-settled Eleventh Circuit precedent, which requires that a party seeking relief under Rule 56(f) must "present an affidavit containing specific facts explaining his failure to respond to the adverse party's motion for summary judgment via counter affidavits establishing genuine issues of material fact for trial," and "must show the court how the stay will operate to permit him to rebut, through discovery, the movant's contentions." See *Barfield* v. *Brierton*, 883 F.2d 923, 931 (11th Cir. 1989). Because petitioners' affidavit supporting their Rule

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[11] Petitioners cite two previous Eleventh Circuit cases for the proposition that a party is entitled to "adequate discovery" before summary judgment may be granted against it. See Pet. 11 (citing *Jones* v. *City of Columbus*, 120 F.3d 248 (1997), cert. denied, 523 U.S. 1118 (1998), and *WSB-TV* v. *Lee*, 842 F.2d 1266, 1269 (1988)). Those decisions merely stand for the proposition that, before summary judgment may be entered, the record before the court must be adequate. In this case, the district court expressly held that the record before it—which included extensive briefing, affidavits, and exhibits from the preliminary injunction stage—was ample for deciding the motions for summary judgment.

56(f) motion failed to itemize any specific facts that additional discovery would produce and instead included only "vague assertions that additional discovery will produce needed, but unspecified, facts," *ibid.*, the Rule 56(f) motion was properly denied and petitioners were not subject to an unjustified pre-discovery burden.[12] See *SEC* v. *Spence & Green Chem. Co.*, 612 F.2d 896, 900 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981).

2. Petitioners assert (Pet. 12-14) that the court of appeals improperly relied upon this Court's recent decision in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), to impose a higher burden of specificity in pleading constitutional claims. See Pet. 12 (citing Pet. App. 6a); Pet. 17. The court of appeals stated:

> Finally, concerning the Rule 56(f) issue, the Tribe has not demonstrated how further discovery would "enable [it] . . . to rebut the [defendants'] showing of the absence of a genuine issue of fact." *SEC v. Spencer & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980) * * * (quoting *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975)) (internal quotation marks omitted). The district court therefore did not abuse its discretion in denying the Tribe's rule 56(f) motion and staying discovery pending disposition of the defendants' summary judgment motions. *See Jones*

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[12] As in the district court and in the court of appeals, petitioners' account (Pet. 17-19) of the substance of the affidavits they submitted to the district court merely shows that they sought discovery on issues that were not disputed and/or were not material to their claims, and that they failed entirely to show how the requested discovery would enable them to show a genuine issue of material fact. See Pet. App. 9a n.1 (citing cases).

> *v. City of Columbus*, 120 F.3d 248, 251 (11th Cir. 1997) (abuse of discretion review for discovery decisions generally); *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (abuse of discretion review for rule 56(f) decisions); *see generally Crawford-El*, 118 S. Ct. at 1596-97 (quoting *Siegert v. Gilley*, 500 U.S. at 236 (A district court "may insist that the plaintiff put forward specific, nonconclusory factual allegations[] that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

Pet. App. 6a.

Petitioners err in claiming that the Eleventh Circuit utilized a brief citation in an unpublished opinion to alter the generally accepted standards governing when summary judgment may be granted on a constitutional claim. As the excerpt quoted above makes clear, the court of appeals cited *Crawford-El* for the proposition that where a party has moved pursuant to Rule 56(f) to stay a ruling on a motion for summary judgment and fails to demonstrate how further discovery would rebut the moving party's showing of the absence of a genuine issue of fact, a district court's denial of such motion is not an abuse of discretion. See also *Crawford-El*, 523 U.S. at 598-600 (discussing discretion and tools available to district courts for managing, tailoring, and/or barring discovery).[13]

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[13] Petitioners chide the court of appeals for citing this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 197-200 (1989); and *Church of Lukumi Babalu-Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-546 (1993), because, according to petitioners, those cases "did not involve pre-discovery summary judgment." Pet. 14-15. The court of appeals cited those

3. Finally, petitioners argue (Pet. 20-22) that the court of appeals erred in "retroactively" applying this Court's decision in *Crawford-El* to their claims without permitting them to return to district court to amend their complaint. As discussed above, however, the court of appeals addressed the district court's denial of petitioners' Rule 56(f) motion under well-settled Eleventh Circuit precedent. Indeed, in the passage in *Crawford-El* that the court of appeals cited, the Court noted that it was recounting "the *existing* procedures available to federal trial judges." 523 U.S. at 597 (emphasis added). The court of appeals' application of settled law regarding summary judgment practice to petitioners' claims did not deny petitioners "fundamental fairness, procedural due process and equity." Pet. 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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cases, however, to illustrate the necessary elements of an equal protection or due process claim, not as support for any principle regarding summary judgment practice. See Pet. App. 3a-4a.

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No. 98-1692

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe
and BILLY CYPRESS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

RESPONDENTS FAILED TO REBUT THE TRIBE'S ARGUMENT THAT THE GRANT OF SUMMARY JUDGMENT PRIOR TO ANY DISCOVERY WAS CONTRARY TO SUPREME COURT AND APPELLATE PRECEDENT AND THAT, AT A MINIMUM, THE TRIBE SHOULD HAVE BEEN PERMITTED TO AMEND ITS COMPLAINT.

The Tribe disagrees with the general self-serving conclusions in Respondents' statement of facts. For example, the South Florida Water Management District ("SFWMD") asserts that it took all possible steps to alleviate flooding in Tribal lands (SFWMD Brief at 7-11). However, despite months of discussions with defendants, aimed at alleviating conditions in Tribal lands, and despite admissions that vegetation removal would alleviate flooding, defendants knowingly kept the Tribe's lands flooded. (*See* Pet. at 10).

Respondents incorrectly argue that summary judgment was proper here because the record was adequate and included "extensive briefing, affidavits, and exhibits form the preliminary injunction stage" (Brief of Federal Respondents at 15 n.11). The record in this case was completely inadequate because the Tribe was never afforded the opportunity to conduct *any* discovery. (*See* Pet. App. 55a). The Motions for Summary Judgement were filed within less than two months of the hearings for preliminary injunction and, in fact, Federal Respondents Answered the Complaint at the same time they filed for summary judgment on May 15, 1995 (R-2:41, 42, 43, 51-55). Approximately thirty days thereafter, the Tribe filed its Fed. R. Civ. P. 56(f) Motion (R2:65) and also filed its requests for discovery. The Respondents then filed their Motions for a Protective Order (R2:81, 88). Thus, this is not a case where the Tribe neglected to timely request discovery. Within four months

of the filing of the Complaint, the district court denied the Tribe's Rule 56(f) motion and stayed discovery until the district court ruled on the pending motions for summary judgment and the SFWMD's Motion to Dismiss. (R3:97).

Respondents' argument (*see* Respondent SFWMD's Brief at 13 and Federal Respondents' brief at 16) that additional discovery was not appropriate, and/or that the Tribe failed to pursue discovery, on the face of this record, lacks any merit.

Respondents fail to adequately address the difference between prediscovery summary judgment granted by the district court here, and upheld by the Eleventh Circuit, and cases such as *Celotex v. Catrett*, 477 U.S. 317, 323 (1986), where there had been substantial discovery. The district court did not permit the Tribe even the most basic right to discovery, as required by the Supreme Court in *Celotex, supra*, and by appellate precedent of the Eleventh Circuit, as well as other Circuit Courts of Appeal. *See, e.g., Jones v. City of Columbus*, 120 F.3d 248 (11th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1797 (1998); *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988); *Miller v. United States* 710 F.2d 656, 666 (10th Cir), *cert. denied*, 464 U.S. 939 (1983); *National Life Ins. Co. v. Solomon*, 529 F.2d 59 (2nd Cir. 1975). In this case the Tribe was forced to file a premature Rule 56(f) motion in an attempt to survive prediscovery summary judgment. Further, the Tribe was not permitted to amend its Complaint. The posture of the case at bar is distinguishable from that in *Celotex*, where the summary judgment motion was filed a year after commencement of the action, upon completion of discovery by the non-movant. *Celotex, supra*, 477 U.S. at 326.

Furthermore, the Respondents have failed to adequately address the Tribe's arguments that even without discovery, disputed material issues of fact were presented in the Tribe's

Rule 56(f) Motion and attached affidavits, which also showed that the Tribe was entitled to discovery. For example, in granting summary judgment, the district court found that "federal defendants have produced evidence showing non-discriminatory reasons for denying the Tribe's request." (Pet. App. 45a). The district court further found that "[t]he Tribe has not shown that these reasons were a pretext for discrimination" (Pet. App. 45a). However, the Tribe was not permitted any discovery to rebut the material disputed issues of fact relied upon by district court. Moreover, there were numerous disputed issues of fact which, even without discovery, the Tribe was able to dispute by affidavits in its motion under Fed. R. Civ. P. 56(f). (*See* Tribe's Petition for Writ of Certiorari at 17-19). In fact, Federal Respondents' own Response brief shows that there are disputed issues of fact. The Response refers to decisions by various federal agencies and the alleged reasons for the decisions. (Respondents' brief at 9-10 and n.5 and n.6). The Respondents' brief concludes that the federal defendants' decisions were proper, and balanced the "needs" of Everglades National Park. *Id.* Federal Respondents are not entitled to the factual conclusion that they did not discriminate against the Tribe or violate constitutional rights without ever allowing the Tribe the opportunity to even begin to prove its case. Unlike the case of *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), where there was evidence that the government had attempted to minimize impact on religious practices, here, the Tribe was never allowed discovery to show that the government did nothing to protect it. *Id.* at 454; *see also* remarks of Barbara West (Pet. at 9).

Federal Respondents' argument that the Eleventh Circuit did not alter generally accepted standards governing summary judgment when it relied upon this Court's decision of *Crawford -El v. Britton*, 523 U.S. 574, __, 118 S. Ct. 1534, 1596-97 (1998) is simply incorrect. A review of the Eleventh Circuit's opinion

shows that the Eleventh Circuit not only ignored the posture of the case, which was prediscovery summary judgment, but it also erroneously decided the case based on a standard not applicable to this case by relying on the decision of *Crawford-El*, and particularly by citing to specific pages of that decision:

> The Tribe has not alleged any specific, claims. See Fed. R. Civ. P. 56(e) (Summary judgment a genuine issue for trial."); *Crawford-El v. Britton*, 118 S.Ct 1584, 1596-97 (1998) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

Pet. App. at 4a.

As the Tribe correctly noted in its Petition, in relying on *Crawford-El* to support its holding, the Eleventh Circuit Court of Appeal relied on the portion of the *Crawford-El* decision where this Court explained existing procedures available to judges in handling claims of improper motive. Thus, the Eleventh Circuit incorrectly relied upon the portion of the *Crawford-El* opinion involving individual capacity suits, *Crawford-El v. Britton*, *supra*, 523 U.S. 574, __, 118 S. Ct. at 1596-97, to uphold the district court's grant of Respondents' prediscovery summary judgment motions. However, in this case, the individual capacity claims had been previously dismissed. There is confusion following the decision in *Crawford-El* regarding the applicable standard. *See, e.g., Ross v. State of Alabama*, 15 F. Supp. 2d 1173, 1191 n.10 (S.D. Ala. 1998).

Nor do Respondents adequately address the Tribe's argument that even if *Crawford-El* had changed the pleading requirements for cases such as the one at bar, at a minimum, the Tribe should have been permitted to amend its Complaint. *See, e.g.*, Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Thomas v. Town of Dane*, 847 F.2d 771, 773 (11th Cir. 1988). Federal Respondents merely refer to the *Crawford-El* passage cited by the Eleventh Circuit which, as stated above, explained procedures available to judges in handling claims of improper motive in individual capacity suits and then argue that in *Crawford-El* the Supreme Court was recounting the existing procedures available to federal judges. However, those procedures which the Supreme Court "recounted" in the cited portion involved individual capacity claims; this case did not involve individual capacity claims as those claims were dismissed by the Tribe. The SFWMD also argues, in its Response (SFWMD's Brief at 12 n.10), that the Eleventh Circuit did not err when it relied on *Crawford-El*. However, neither the SFWMD nor Federal Respondents explain how the Eleventh Circuit could have properly relied on the portion of the *Crawford-El* decision discussing procedures for individual capacity cases. The SFWMD argues that the Tribe should not get "another bite at the apple" (SFWMD Response at 12 n.10). However, the Tribe is not asking for another bite at the apple. The Tribe merely requests the first bite . . . one to which it is entitled under Supreme Court as well as appellate precedent.

CONCLUSION

For the reasons stated herein and in the Tribe's Petition for Writ of Certiorari the Tribe respectfully requests that this Court grant certiorari review.

Respectfully submitted,

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